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VIA ELECTRONIC MAIL helmlinger.andrew@epa.gov and U.S. MAIL

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75 Hawthorne Street
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Re: Dominguez Mystery Spill – Request to Rescind Order for Removal, Mitigation or Prevention of a Substantial Threat of Oil Discharge (Order No. OPA CWA 311-09-2011-0001)

Dear Mr. Helmlinger:

As you know, this firm represents the Alameda Corridor Transportation Authority ("ACTA") in connection with the above-referenced Order (the "Order") that was issued to ACTA and the Ports of Los Angeles and Long Beach on January 7, 2011. ACTA is a joint powers authority created by the Cities of Los Angeles and Long Beach. The Order requires ACTA and the Ports to take certain actions in response to a discharge of oil into the Dominguez Channel. ACTA and the Ports have undertaken all work required of them under the Order pursuant to the understanding they reached with EPA, as set forth in our letter to you dated February 1, 2011, at substantial cost. This work has included enhancing, and then effectively operating and maintaining, the oil containment systems; cleaning out the trunk line and wet-well at the City of Los Angeles Pump Station; and identifying the source of the oil discharge.

We now write on behalf of ACTA to formally request that EPA rescind the Order. The Ports of Los Angeles and Long Beach (the "Ports"), through their respective counsel, Ken Mattfeld and Lisa Bond, join in this request. We believe such action is warranted in light of EPA's issuance of a similar, and broader, order to Crimson Pipeline Management, Inc. ("Crimson") on March 30, 2011, and EPA's determination that the oil discharged to the Channel originated from a crack in the casing of an oil carrier pipeline owned and operated by Crimson. As we discuss more fully below, neither ACTA nor the Ports are a "responsible party" with regard to the discharge of oil into the Channel, because they do not own or operate an "oil pipeline" or an "onshore facility" as is otherwise required by the relevant law.

The Order was issued pursuant to section 311(c) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(c). Section 311(c) provides that the term "responsible party" has the same meaning given that term under section 1001 of the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701. Under section 1001 of OPA, the term "responsible party" is defined, in relevant part, as

follows: (1) "In the case of a pipeline, any person owning or operating the pipeline" (33 U.S.C. § 2701(32)(E)); and (2) "In the case of an onshore facility (other than a pipeline), any person owning or operating the facility" (33 U.S.C. § 2701(32)(B)). Here, the oil that discharged to the Dominguez Channel originated from a Crimson carrier pipeline. Crimson – not ACTA or the Ports – owns and operates that "pipeline," and therefore Crimson is a responsible party within the meaning of OPA; ACTA and the Ports are not.

EPA contends that Crimson's oil from its leaking carrier pipeline entered and migrated through ACTA's storm drain system, and ultimately discharged to the Channel. Even if true, this would not make ACTA's storm drain system an "onshore facility" under OPA. OPA defines the term "onshore facility" to mean "any facility...of any kind located in, on, or under, any land within the United States...." 33 U.S.C. § 2701(24). The term "facility," in turn, is defined as "any structure, group of structures, equipment, or device (other than a vessel) *which is used for* one or more of the following purposes: *exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.*" *Id.* at § 2701(9) (emphasis added). The ACTA storm drain was not designed, intended or used to transport oil (nor for any other purpose set forth in this definition); instead, it was designed, intended and used to collect and manage stormwater. It follows that the ACTA drain is not an "onshore facility" within the meaning of OPA, and therefore ACTA and the Ports are not responsible parties under this subsection either.

EPA based its issuance of the Order to ACTA and the Ports on the claim that ACTA and the Ports "own, operate, and/or maintain the property from which oil discharged into the City of Los Angeles storm water management system." However, neither ACTA nor the Ports can be liable under OPA based solely on their status as the owner of property impacted by the leak of Crimson's oil. In *United States v. Viking Resources, Inc.*, 607 F. Supp. 2d 808 (S.D. Tex. 2009), the United States claimed the defendant oil and gas lessee was a responsible party under OPA for a spill that had originated from an old tank battery standing above the defendant's leasehold. The court rejected the government's argument that the defendant might be liable based solely on its ownership of the underlying leasehold, ruling that "the government must prove that [defendant] owned or operated the *old tank battery itself*." *Id.* at 818 (emphasis in original). The court went on to state that the government "may not circumvent this burden by inappropriately expanding the scope of the 'facility' based solely on geography." *Id.* Similarly here, ACTA and the Ports are not the owners or operators of the "pipeline" or "onshore facility" that was the actual source of the oil discharged to the Channel.

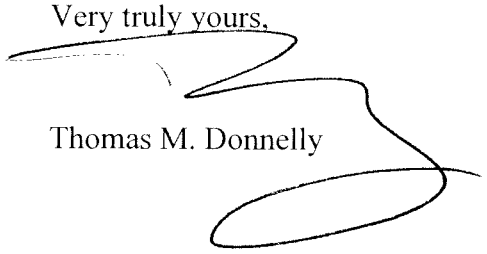
We understand Crimson is alleging that during the installation of the storm drain, a contractor for the Port of Los Angeles caused a crack in the casing that allowed oil to leak from the Crimson carrier pipeline. We do not know whether this, in fact, occurred, and we are continuing to investigate the circumstances surrounding the installation of the storm drain. Nevertheless, Crimson's allegation that a third party caused the crack does not justify leaving the Order in place as to ACTA and the Ports. *First*, Crimson bears a heavy burden of proving that such alleged third party acts or omissions were the "sole cause" of the oil discharge, and that

Crimson has met all of the other elements of that defense. 33 U.S.C. § 2703(a)(3). *Second*, even if Crimson could meet this heavy burden of proof, OPA would still require Crimson to pay all removal costs and damages to any claimant, and then seek to recover such removal costs or damages from the third party by subrogation. 33 U.S.C. § 2702(d)(1)(B). The fact that Crimson may at some point attempt to recover some or all of its removal costs from a third party – including a contractor for the Port of Los Angeles – does not change the fact that ACTA and the Ports are not the owners or operators of a "pipeline" or "onshore facility," and therefore are not "responsible parties" under OPA or the CWA.

Please note that ACTA and the Ports will continue to cooperate with Crimson as it undertakes the work required by its order, including by providing Crimson with reasonable access to the railroad right-of-way, regardless of the decision EPA makes on this rescission request.

For all these reasons, ACTA and the Ports respectfully request that EPA rescind the Order. Please do not hesitate to call me if you have any questions or wish to discuss this matter.

Very truly yours,



Thomas M. Donnelly

cc: John Doherty, ACTA
Lisa Bond, POLB
Ken Mattfeld, POLA
Marcus Squarrell, Crimson